NATIONAL RAILWAY LABOR CONFERENCE

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September 20, 2004

BY HAND DELIVERY

Roland Watkins
Director of Arbitration
National Mediation Board
1301 K Street, N.W., Suite 250 - East
Washington, D.C. 20572

Re: NMB Docket No. 2003-01N; Comments of the National Railway Labor Conference

Dear Mr. Watkins:

The National Railway Labor Conference ("NRLC") submits these comments in response to the notice of proposed rulemaking by the National Mediation Board ("NMB") regarding administration of arbitration programs.[1] See 69 Fed. Reg. 48177 (Aug. 9, 2004). The NRLC represents the nation's major freight railroads, including The Burlington Northern and Santa Fe Railway, CSX Transportation, Inc., Grand Trunk Corporation (Canadian National Railway), Kansas City Southern Railway, Norfolk Southern Railway, Soo Line Railroad (Canadian Pacific Railway), and Union Pacific Railroad.

Introduction

The proposed rules issued by the NMB on August 9, 2004, are, in the words of the notice, an attempt to "facilitate the more timely resolution of grievances ('minor disputes') among grievants and carriers in the railroad industry." 69 Fed. Reg. 48177. Among other things, the Board is proposing new rules allowing the Director of Arbitration to consolidate cases (§ 1210.9), and requiring the National Railroad Adjustment Board ("NRAB") to progress cases according to a particular schedule (§ 1210.10). The proposed rules also include detailed criteria

1 These comments supplement the NRLC's comments of September 8, 2003, in response to the NMB's advanced notice of proposed rulemaking. 68 Fed. Reg. 46983 (Aug. 7, 2003). Because of the similarities between the current notice of proposed rulemaking and the advance notice of proposed rulemaking, there is substantial overlap between these comments and the NRLC's comments of September 8, 2003. The NRLC incorporates by reference its earlier comments, a copy of which is attached hereto.

for the roster of arbitrators (§ 1210.5) and a new fee structure (§ 1210.12).

There are aspects of these proposed rules – such as the new filing fees – that are positive developments and should be applauded. However, the NRLC remains of the view (expressed in its comments of September 8, 2003) that the Board lacks authority under the Railway Labor Act ("RLA"), 45 U.S.C. § 151 et seq. to engage in this proposed rulemaking. While filing fees may be justified under other statutory authority, the NMB has no power under the RLA to set rules of procedure for the NRAB, or to interfere in the procedures of public law boards ("PLBs") or special boards of adjustment ("SBAs"). It is the parties – railroads and their employees – that have the statutory authority to decide matters of arbitration procedure. The NMB asserts that its authority for the proposed rulemaking derives from its statutory duty to fund arbitration under Section 154 Third of the RLA. But at least some of the proposed rules – especially the proposed consolidation and scheduling rules – cannot be characterized as simply questions of arbitration expenditures. These are critical matters of arbitration procedure, which often directly affect the substantive rights of carriers and employees. The Board's proposed rules would violate the clear statutory right of the parties to decide such issues for themselves.

Moreover, subject to and without waiving this threshold objection to the NMB's proposed rulemaking, the railroad industry continues to believe that the proposed rules respecting consolidation and scheduling are ill-advised. Because of the nuances and variations inherent in and among arbitration cases, decisions regarding consolidation and special or extended schedules must be left to the NRAB and/or the parties, who are in a far better position to judge whether such measures are appropriate in any given case.

While these are the most serious problems, the NRLC also has concerns about other aspects of the proposed rules. For example, the proposed rules are not clear about the standards for arbitrators, and fail to acknowledge the parties' right to select a neutral. Nor do the proposed rules explain how, exactly, the Director of Arbitration Services will select neutral referees, and include no reference to the "strike list" procedure that has generally worked well for many PLBs and SBAs in the past. Also, while the railroads heartily approve of the concept of application fees as a means of controlling the ongoing deluge of new claims, the fees proposed by the Board are likely too low to have an adequate impact in this regard, and should be adjusted upward.

We explain all of these points in greater detail below.

Argument

I. The NMB Lacks Statutory Authority to Dictate Procedural Rules Regarding Consolidation and Scheduling of Arbitrations Under the Railway Labor Act

In its notice of rulemaking, the NMB claims authority to engage in this rulemaking based on "the NMB's statutory responsibility for the appointment and compensation of neutral arbitrators ('referees') to resolve deadlocks within NRAB divisions, and the NMB's overall statutory responsibility for the administrative processing of grievances." 69 Fed. Reg. 48177.

The Board further asserts that the RLA "provides the NMB with authority for administration, including making expenditures for necessary expenses, of the NRAB, the PLBs and SBAs." Id. at 48178.

As the NRLC has previously explained, the NMB does not, in fact, have any authority under the RLA to make rules of procedure for the NRAB or PLBs and SBAs, but rather is limited to decisions regarding funding of arbitrations. See NRLC Comments (Sept. 8., 2003) at 2-5. In this section, we review the statutory analysis behind that conclusion, and then show that the currently proposed consolidation and scheduling rules are not simply matters of arbitration expenditures and so cannot be justified under the NMB's narrowly-defined power over the fiscal aspects of arbitration proceedings.

A. The Railway Labor Act Gives the NMB Only Fiscal Authority, Not Rulemaking Authority Over Arbitration Procedures.

In the 1934 amendments to the RLA, Congress established both the NRAB and the NMB. See generally 45 U.S.C. §§ 153, 154. In creating the NRAB, Congress defined, to a substantial degree, the procedures of the Adjustment Board, including the establishment of four different divisions and a headquarters in Chicago, selection of the Board's members, and various requirements for Board hearings, voting, awards, and enforcement. 45 U.S.C. § 153 First (a) – (r). But to the extent that Congress did not set the NRAB's rules and procedures, it specifically left such matters to the Adjustment Board. Section 3 First (v) states:

> "The Adjustment Board shall meet within forty days after June 21, 1934, and *adopt such rules as it deems necessary to control proceedings before the respective divisions* and not in conflict with this section. Immediately following the meeting of the entire Board and the adoption of such rules, the respective divisions shall meet and organize by the selection of a chairman, a vice chairman, and a secretary."

45 U.S.C. § 153 First (v) (emphasis added). Under the plain language of the RLA, therefore, the NRAB, not the NMB, has the responsibility to adopt rules to "control proceedings" in arbitration, which clearly encompasses subjects such as procedures for consolidation and scheduling.

That Congress intended to leave to the NRAB itself the discretion to make its own rules and procedures is further confirmed by Section 3 First (x), which provides that "[a]ny division of the Adjustment Board shall have authority, in its discretion, to establish regional adjustment boards to act in its place . . . ." 45 U.S.C. § 153 First (x). These regional boards are granted authority to "conduct hearings, make findings upon disputes *and adopt the same procedure as the division of the Adjustment Board appointing it* . . . ." Id. (emphasis added). Thus, whenever the RLA speaks of authority to create rules of procedure, it vests such powers in the NRAB and its constituents.[2]

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2 More generally, the RLA grants the parties and/or the NRAB autonomy when it comes to the actual handling and disposition of minor disputes. Parties first process grievances "in the usual manner" on the property, and then submit disputes directly to the divisions of the Adjustment Board, which are empowered to agree on an

The NMB, by contrast, does not have any statutory right to control NRAB procedures, and certainly does not have plenary authority over "all aspects of NRAB . . . activities." To the extent that Congress gave the NMB power relating to the NRAB, it expressly limited that authority to two particular categories. First, the NMB was tasked with responsibility for appointing a neutral referee only when a division of the Adjustment Board is unable to agree upon a neutral. 45 U.S.C. § 153 First (l). Second, the NMB was granted authority over the NRAB's expenditures. The RLA provides that the

> "Mediation Board may . . . make such expenditures (including expenditures for rent and personal services . . . salaries and compensation, necessary traveling expenses and expenses actually incurred for subsistence, and other necessary expenditures of the . . . Adjustment Board . . .), as may be necessary for the execution of the functions vested . . . in the Adjustment Board . . . and as may be provided for by the Congress from time to time."

45 U.S.C. 154 Third; see also 45 U.S.C. § 153 First (u) (providing for NMB approval of compensation of assistants employed by Adjustment Board).

This same division between fiscal authority and power over procedural rules is evident in the RLA's provisions for PLBs and SBAs. Section 3 Second of the RLA expressly provides that only the parties – carriers and representatives of employees – may establish an SBA or PLB. 45 U.S.C. § 153 Second. The schedule, composition, powers, jurisdiction, and procedures of such boards are set by agreement of the parties, and the RLA expressly provides for a "procedural neutral" process if the parties are unable to agree on "the establishment and jurisdiction of" a PLB. Id. The NMB has no statutory role in this process, except for appointing the procedural neutral upon the request of the parties. Otherwise, the NMB's role is again one of funding only – Section 3 Second (second para.) provides that "the neutral person so selected or appointed shall be compensated and reimbursed for expenses by the Mediation Board." Id.

The history of the administration of the RLA and its arbitration processes further supports this point. As far as the railroads are aware, the NMB has never before attempted to regulate arbitration procedures in the fashion outlined in the proposed rulemaking, but rather has always left such matters to the NRAB and the parties. In fact, until now the NMB has always affirmatively and repeatedly disavowed any power to dictate arbitration procedures. In one of the NMB's earliest reports, for example, the Mediation Board noted that "the law makes the jurisdiction of [the NRAB] wholly independent of the National Mediation Board, except that money expenditures of the Adjustment Board must be approved by the Mediation Board, and in case any division of the Adjustment Board is deadlocked and fails to make an award, the National Mediation Board is required to appoint a referee to . . . make the award." NMB Second Annual Report (FY 1936) at 33. As recently as 1999, the NMB acknowledged that "it does not

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award, select a neutral to sit with the division, and issue orders and interpretations of awards, which are considered "final and binding." 45 U.S.C. § 153 First (i), (k) – (m), (o), (q). None of these procedures call for the involvement of the NMB.

have the authority to require the NRAB to adopt" the same sort of procedures for expediting cases at issue today. NMB Memorandum to Members of Section 3 Committee (June 18, 1999). The simple fact is that for almost seventy years, the RLA community – the carriers and the unions, as well as the NMB and the NRAB – has operated with the understanding that the NMB does not set the rules of procedure for arbitrations. This rulemaking initiative is, therefore, an unprecedented break with a long-settled and well-respected division of responsibility between the NMB on the one hand, and the NRAB and the parties on the other.

Given this line of demarcation under the RLA, it is clear that the NMB cannot simply issue new procedural rules for the NRAB or other arbitration panels. Its claim that the Board has authority over "all aspects" of arbitrations lacks any statutory support. Control over arbitration expenditures is not the same as a general right to "administer" the NRAB or other arbitration panels, and certainly does not permit the NMB to dictate the content of arbitration procedures, policies, and rules.[3] The NMB's responsibility for paying the salaries of NRAB support personnel and neutrals appointed to the NRAB and PLBs does not somehow allow it to trump the statutory assignment of responsibility for procedures to the NRAB and the parties.

B. Rules Governing Consolidations and Scheduling Are Matters of Arbitration Procedure, Not Arbitration Finances

At certain points in its notice of proposed rulemaking, the NMB seems to acknowledge – albeit tentatively – that the Board's authority over arbitrations is only fiscal in nature. In particular, the NMB states that it "agrees, for the present time, that it will not participate in the substantive decision-making process" of the NRAB or "prescribe specific case handling procedures for the NRAB and the other arbitration boards." 69 Fed. Reg. 48178. Rather, the Board suggests, its proposed procedural rules are really just about arbitration expenditures and are, therefore based on the Board's funding power. It asserts, for example, that the proposed consolidation rule in § 1210.9 is justified by the Board's "existing responsibilities to provide for the efficient and economical expenditure of public funds." Id. at 48179. It likewise characterizes the rule setting a default arbitration schedule as a "funding schedule," providing that the "NMB will only pay for arbitration of cases which are progressed" under its specific terms. Id. at 48178, 48182.

Nevertheless, an examination of the proposed rules reveals that the Board has plainly *not* limited itself to matters concerning the compensation of arbitrators. Rather, it has strayed into issues well outside its jurisdiction, particularly with regard to the proposed consolidation rule and the proposed scheduling rule.

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3 As we explained in detail in the NRLC's comments of September 8, 2003, this point is further supported by the fact that the NRAB and the NMB are subject to different rulemaking requirements under the Administrative Procedures Act ("APA"). See NRLC Comments (Sept. 8, 2003) at 4-5.

(1) *The Proposed Consolidation Rule*

The question whether to consolidate cases is a quintessential issue of arbitration procedure. See, e.g., Elkouri & Elkouri, How Arbitration Works, 299-300 (6th ed. 2003). Pursuant to the RLA and long-standing practice, the consolidation question is decided by the parties as part of the process of referring matters to the NRAB, or in reaching an agreement on an SBA or PLB. Absent agreement between the parties, the issue of consolidation may be handled by a procedural neutral. In such cases, the procedural neutral must examine, among other things, (1) what the parties' CBAs say, if anything, about consolidation of grievances, (2) past practices, (3) special factual circumstances, such as disparate geographic sources of the multiple claims, and (4) the potential for prejudice to either side. See Elkouri at 299 (collecting cases). In other words, consolidation decisions require substantive review of the facts – the decision-maker often must delve into at least the periphery of the parties' dispute on the merits. Hence, it is impossible to characterize consolidation decisions as simply a matter of funding.

In fact, notwithstanding the NMB's asserted link between the proposed consolidation rule and its funding authority, it is obvious that there is in fact no connection between the two. As it reads, the proposed rule would permit the Director of Arbitration to order consolidation of *any* cases pending before the NRAB, PLBs, or SBAs, regardless of whether the NMB is providing funding for such proceedings. See 69 Fed. Reg. 48182. This clearly exceeds the NMB's authority.

But even if consolidations were just a question of arbitration expenditures, the proposed rule could not be justified under the NMB's funding authority. Under Section 154 Third, the NMB "may" make expenditures for the expenses of the NRAB and other "boards of arbitration." 45 U.S.C. § 154 Third. By contrast, the NMB does not have any discretion under the RLA when it comes to compensation of neutrals of the NRAB or PLBs. With respect to the NRAB, Section 153 First (l) provides that the NMB "*shall* fix and pay the compensation of such referees." Likewise, with respect to PLBs, Section 3 Second provides that "[t]he neutral person so selected or appointed *shall* be compensated and reimbursed for expenses by the Medication Board." This means that the NMB is required by statute to fund these arbitrations, regardless of whether it believes that they should be consolidated or not.[4] There is no other plausible basis for linking consolidation to arbitration expenditures, and thus the NMB cannot regulate consolidations by way of Section 154 Third.

Moreover, even if the NMB did have fiscal discretion on this point, it cannot do indirectly, through its funding powers, what it could not do directly. The courts have been quite clear that while the NMB has certain powers under the RLA, it cannot exercise those powers in a manner that overrides or contradicts other provisions of the Act. Thus, in the case of RLEA v. NMB, the D.C. Circuit addressed an argument by the Mediation Board that it had broad, unreviewable powers to create new administrative rules (the so-called Merger Procedures) that

4 As far as the carriers are aware, the only circumstance in which the Board may refuse to provide funding is if the funds would exceed the amount appropriated by Congress. 31 U.S.C. § 1341 (Anti-Deficiency Act).

conflicted with specific provisions of the RLA. 29 F.3d 655 (D.C. Cir.) (en banc), amended 38 F.3d 1224 (D.C. Cir. 1994) (en banc). The issue involved the NMB's assertion of jurisdiction to investigate representation disputes, notwithstanding the language of Section 2 Ninth, which state that only employees and their representatives could request an investigation. Because the case involved issues relating to representation, the Board argued, it was entitled to the highest possible level of deference.

Nevertheless, the Court unequivocally rejected the NMB's argument that it had the authority to create such rules. The Court held that the Mediation Board's power is no greater than that delegated to it by Congress:

> "The extent of an agency's powers can be decided only by considering the powers Congress specifically granted to it in the light of the statutory language and background. . . . The *duty* to act under certain carefully defined circumstances simply does not subsume the *discretion* to act under other, wholly different, circumstances, unless the statute bears such a reading . . . ."

Id. at 671 (emphasis in original). By contrast, when courts have upheld the NMB's exercise of its financial authority, they have done so only in circumstances where the Board's discretion did not conflict with other portions of the RLA. See RLEA v. NMB, 583 F. Supp. 279, 281 (D.D.C. 1984).[5]

Here, the NMB's attempt to regulate consolidations intrudes on the jurisdiction of the NRAB, pursuant to Section 3 First (v), to set its own rules of procedure. 45 U.S.C. § 153 First (v). Likewise, consolidation of PLB or SBA proceedings violates the reservation of such procedural matters to the parties or to a procedural neutral under Section 3 Second. Id. at § 153 Second. Thus, this scenario presents precisely the same problem as the Board encountered in the Merger Procedures case. Because any attempt to use the NMB's fiscal authority to consolidate cases would run afoul of other portions of the RLA, the proposed rules are invalid.

(2) *The Proposed Scheduling Rule*

The proposed § 1210.10 exceeds the NMB's authority for much the same reasons. In this proposed rule, the NMB states that the Board "will only pay for arbitration of cases at the NRAB which are progressed according to" a set schedule, including time limits for party submissions, hearings, and decisions. 69 Fed. Reg. 48182. The proposed rule also states that the NMB will only pay for PLBs and SBAs "heard and decided within one year of the addition of the case to the Board." Id.

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5 The court noted that the NMB was not required to make expenditures for the NRAB's office space, and "*in the absence of such a congressional mandate*, the agency retains the discretion to make this determination." Id. at 281. See also RLEA v. NMB, 785 F. Supp. 167 (D.D.C.), aff'd, 757 F.2d 1342 (D.C. Cir. 1991) (noting that "in the absence of statutory authority on the subject," the NMB is not required to fund SBAs established under the first paragraph of Section 3 Second).

Again, the NMB is stretching its asserted fiscal power too far. On its face, the issue of scheduling is not a matter of arbitration expenditures. Rather, scheduling is a matter of vital importance – often with direct impact on the merits – which has always been handled under rules of procedure, whether it is the NRAB's rules, or the *ad hoc* rules agreed to by the parties in any particular SBA or PLB proceeding, or the rules established by a procedural neutral under Section 3 Second.[6]

Nor can the proposed § 1210.10 be justified by the fact that it nominally addresses only whether the NMB will pay for arbitration proceedings. As noted above, the NMB does *not* have discretion when it comes to funding of NRAB and PLB arbitrations – the statute specifically states that the NMB "shall" pay the compensation for neutrals assigned to such proceedings. 45 U.S.C. §§ 153 First (l); 153 Second. Thus, the NMB does not have the power to decide that it will only fund NRAB or PLB arbitrations that comply with the NMB's chosen schedule.

In any event, the Board never articulates how, exactly, a "one-year" rule or the other proposed deadlines will help resolve its concerns about the costs of RLA arbitration. From the railroads' perspective, the only direct link between the duration and the costs of arbitration is the fact that arbitration funding regularly runs out in the middle of the fiscal year, causing substantial delays. The proposed rule does not address this perpetual problem.

But even if the proposed § 1210.10 could be linked to discretionary funding decisions, it would still be invalid. As noted above, RLEA v. NMB confirms that the Board cannot exercise its discretion in a way that overrides the separate statutory rights of carriers and employees under the RLA. Rather, the Board can only act within the statutory bounds established for it by Congress. Scheduling, like consolidation, is a matter of arbitration procedure, and therefore the RLA clearly assigns it to the NRAB, or the parties in the case of a PLB or SBA (or a procedural neutral if the parties request one). 45 U.S.C. §§ 153 First (v); 153 Second. Because the proposed rule attempts to set – either directly or indirectly – the schedules of NRAB, PLB, and SBA proceedings, it violates these provisions.

In fact, the NMB's proposed scheduling rule directly conflicts with the scheduling rules already adopted by the NRAB in its own rules of procedure, and also conflicts with schedules created by agreement of the parties for pending PLBs and SBAs. The NMB cannot arbitrarily supplant the legitimate scheduling choices of the NRAB and the parties, especially when the Board lacks any statutory power of its own over arbitration scheduling.

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6 While the statute expressly provides for time limits for certain aspects of the arbitration process (i.e., providing for 30 days to select members of the NRAB), nothing in the Act imposes a time limit for the conduct of arbitration proceedings or the issuance of an award. See 45 U.S.C. § 153 Second. Thus, it is well-settled that the parties may decide such matters for themselves. See, e.g., Jones v. St. Louis-San Francisco Ry., 728 F.2d 257 (6th Cir. 1984); Willis v. Burlington N. & S.F. Ry., 167 LRRM 2094, 2103 (S.D. Tex. 2000), aff'd, 244 F.3d 138 (5th Cir. 2000); UTU v. Illinois Central R.R., 998 F. Supp. 874 (N.D. Ill. 1998); Robinson v. PLB 5914, 63 F. Supp. 2d 1266, 1270 (D. Colo. 1999).

For all these reasons, the NMB has no right under the RLA to establish consolidation and scheduling rules for railroad labor arbitrations. The Board should decline to adopt § 1210.9 and § 1210.10 of the proposed rules.

II. Decisions Regarding Consolidations and Arbitration Scheduling Should Not be Made by the National Mediation Board

Even if the NMB did have authority to make rules of arbitration procedure, the railroad industry does not believe that the proposed consolidation and scheduling rules are appropriate or advisable. As carrier representatives have stated during Section 3 Committee proceedings, the railroads support reduction of the current backlog at the NRAB and expeditious handling of new cases. However, new rules adopted for the sake of efficiency should not weaken procedural defenses, bypass legitimate distinctions between facially similar cases, or force summary handling of significant issues. Unfortunately, the proposed consolidation and scheduling rules could very well have such adverse consequences.

A. Consolidation

Outside the world of railroad labor arbitration, both Congress and the federal courts have recognized that procedural decisions, including the consolidation of multiple cases, often have the potential to affect the substantive rights of the parties in such cases. 28 U.S.C. § 2072(b) (providing that federal rules of procedure and evidence "shall not abridge, enlarge, or modify any substantive right"); Fed. R. Civ. P. 42(b) (indicating that risk of prejudice is one reason to separate individual cases); Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79 (2002). With respect to consolidation in particular, it is well-settled that the decision to consolidate can, but must not be permitted to, affect the parties' substantive rights. E.g. In re TMI Litigation, 193 F.3d 613, 725-26 (3rd Cir. 1999).

There are a wide variety of ways in which a consolidation could affect the parties' substantive rights. Aside from confusion and delay, perhaps the biggest risk inherent in consolidating cases is the potential for combining multiple disparate matters into a single proceeding. This can be extremely problematic, as distinctions among cases in a combined proceeding are often lost or blurred, thereby diluting or even eliminating potentially valid claims or defenses. In addition, evidence from one case can often spill over and "taint" the parties' claims or defenses in other cases. For defendants, the consolidation of multiple cases also can mean that they will be forced to settle baseless claims along with any meritorious ones. See generally Elkouri at 299 (noting that "arbitration of multiple grievances may not be required if 'it is clearly shown that to do so would result in confusion, prejudice, or substantial detriment to either party.'") (citation omitted).

These problems can be particularly acute in the railroad labor arbitration context. Many facially similar cases have critical distinguishing features that may not be apparent to persons not intimately familiar with the underlying collective bargaining agreements or the facts of a

particular case. In a group of cases arising out of a subcontracting dispute, for example, there may be some that implicate unique procedural defenses, or turn on the circumstances of the individual making the claim, or involve application of related rules, or implicate different factual circumstances. Especially because many large carriers are composed of merged properties of multiple former railroads and have multiple potentially applicable agreements, issues which at first glance appear to be similar may, in fact, not be because of subtle differences in the agreements and practices.[7]

Accordingly, it is absolutely critical that any consolidation of cases or "lead case" designations remain solely a matter of voluntary agreement by the parties. If the NMB makes determinations about case consolidation or lead case designations, as it proposes to do in § 1210.9, it will inevitably involve substantive decisions about cases, and may even violate the rights and responsibilities of the parties as reflected in the underlying agreements. This is not to suggest that the Mediation Board would do so intentionally, of course, but simply as a consequence of its unfamiliarity with the subtle details and distinctions between cases. Moreover, under the rule as drafted, there would be no appeal whatsoever from such a mistaken consolidation – a party that is prejudiced by an improper consolidation order would lack any means of redressing the error.

The NRLC also notes that until recently, when the Board began unilaterally issuing orders to consolidate pending arbitration cases, the parties have worked with the Board in an attempt to develop defined criteria for consolidation. The railroads stand ready to restart that process if the NMB ends its efforts to impose consolidations on the parties.

B. Scheduling

The railroads agree, in principle, with the goal of resolving all new cases within one year of the date of filing, and believe that such a goal is reasonable and attainable in most circumstances. However, a blanket rule requiring *all* cases to proceed along the same track – and to be completed within one year – is not wise.

Efficient case resolution procedures are generally flexible, and account for changing or unique circumstances. Hence, any solution to the problem of failure to conform to rules or time limits within the arbitral system is necessarily contextual. As the experience of state and federal court systems show, it is impossible to anticipate all potential reasons why parties may fail to meet deadlines or otherwise follow mandatory procedures. There should be similarly flexible responses to such problems in the NRAB system as well.

The proposed § 1210.10 does not accommodate the parties' needs in this regard. By requiring all matters to be arbitrated under a strict, inflexible timetable, the Board ignores the possibility of unavoidable delays and presumptively rejects reasonable alternative schedules.

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7 This is the primary reason why labor arbitration awards do not have automatic preclusive effects in later disputes. E.g. BMWE v. Burlington N. R.R., 24 F.3d 937, 940-41 (7th Cir. 1994); see also Elkouri at 619.

While many cases in the arbitral system are routine and can be handled in an expedited fashion, other cases present extremely important or unusual issues, with industry-wide ramifications. It is not logical to expect that the critical or especially difficult matters will be handled under exactly the same schedule as the run-of-the-mill cases. At a minimum, the proposed rule, if enacted, would generate a flood of requests for extensions to the Director of Arbitration. That is hardly a recipe for efficient and cost-effective scheduling, and is certainly no better than the system currently in place.

But even if simple efficiency could be achieved through adoption of a "one-year" rule, such an approach would have other, unacceptable costs. In particular, if every case must be resolved within one year, there will inevitably be short-cuts and mistakes as a result of time pressure, adversely impacting the fairness and legitimacy of the arbitral system. Gains in efficiency are not worth sacrificing the working perception among carriers and employees that the current NRAB process is, for the most part, functional and fair.

In this regard, it is worth noting that when Congress amended the RLA in 1966, it was well aware of significant delays in the arbitration system. To address this problem, it not only created the option of PLBs, but it also imposed specific time limits for certain events, such as the requirement to agree to a PLB within 30 days from the date of a request. 45 U.S.C. § 153 Second. Yet it did not impose any time limits for arbitration submissions, hearings, or awards. Rather, it left such decisions in the hands of the parties.

III. Other Aspects of the Proposed Rules Should be Modified or Eliminated

There are a number of other provisions within the proposed rules that are unclear, inaccurate, internally inconsistent, or otherwise inadequate to serve the goals annunciated by the NMB in its notice of rulemaking. Without prejudice the railroads' position that the Board lacks authority to promulgate these rules under the RLA, we list below some of the corrections or modifications that should be made to the proposed Part 1210.

First, the proposed rules contain numerous references to powers or responsibilities that the NMB does not, in fact, possess. For example, § 1210.1 states that these rules are issued by the Board "under the authority of section 3 of the [RLA]." 69 Fed. Reg. 48180. As explained above, the NMB has no authority under the portions of Section 153 that pertain to arbitration, save the power to appoint neutrals for NRAB or other arbitration panels. Even under the Board's own theory, its power derives from its fiscal authority under Section 154, not Section 153. Likewise, the railroads take exception to the comments in several portions of the proposed rules (such as § 1210.3(a) – (c)) that claim sweeping powers for the Board over "administration" and "all aspects" of arbitration activities, or "promot[ing] the use of arbitrators." Id. For the reasons stated above, these portions of the proposed rules are simply not accurate.[8] The fact that the

8 The proposed rules also state that the NMB has responsibility for "all records associated with PLBs and SBAs," but the RLA provides no such power to the Board. 69 Fed. Reg. 48180. To the extent that the parties have acquiesced in the Board's system of establishing case numbers for PLBs and SBAs, they have done so only on a voluntary basis.

NMB pays for certain NRAB expenses does not mean it owns the function. But in any event, such provisions are unnecessary and should be removed.

Second, § 1210.2(a)(1) states that the NMB may designate an arbitrator "[w]hen the NRAB is unable to resolve the dispute." Id. That is not technically correct. Rather, the NMB appoints an arbitrator only when requested to do so by the members of the NRAB, a PLB, or an SBA. See 45 U.S.C. §§ 153 First (l); 153 Second. The proposed rules should recognize that it is the parties who have the statutory right, as an initial matter to select a "neutral person" as the referee. Id. If the parties select a neutral who is not on the NMB's roster, that choice should not be subject to question by the NMB.

Third, in § 1210.4(f), the Board notes that it "may establish procedures for the appointment of arbitrators which include consideration of such factors as background and experience, availability, acceptability, geographical location, and the expressed preferences of the parties." 69 Fed. Reg. 48180-81. This is unclear and inconsistent with the "general criteria" for listing on the arbitrators' "Roster" under proposed § 1210.5(b). What are these "procedures" that the Board will establish? How is "background" different from "experience"? What does "acceptability" mean?

Fourth, the exclusion from the arbitrators' Roster covering all "full-time, part-time, *ad hoc*" or other employees of the federal, state, or municipal governments seems overbroad. Such an exclusion would, for example, bar any professors employed at state colleges or universities from serving as arbitrators. It would also bar individuals who receive a stipend for sitting on school boards, municipal advisory boards, and the like.

Fifth, there are unexplained and vague references in § 1210.5(e)(7) to compliance with "administrative requirements prescribed by the [NMB] in connection with the placement or maintenance on the NMB's Roster of arbitrators" and compliance with "other applicable NMB administrative requirements." Id. at 48181. Is this a reference to "administrative requirements" meant to refer back to § 1210.4(f) or § 1210.5(b)? Or is it something else? The provision is unclear. Similarly, the reference to "good standing" in § 1210.6 is undefined and should be clarified. In addition, the rules should acknowledge that the parties have a statutory right to select a "neutral person," regardless of whether that individual is deemed to be in "good standing" by the NMB.

Sixth, the provisions of § 1210.7, which concern procedures for requesting arbitrators, contain no direction on how the selection process will work. The proposed rule simply states that "the Director of Arbitration Services" will "select an arbitrator" to sit with the divisions of the NRAB, PLBs, or SBAs, without explaining how he or she will do so. Under the rule as stated, the Director appears to have complete discretion to employ any procedure whatsoever. It would be better, in the opinion of the railroads, to include some direction concerning how the selection process is to be performed. For example, the use of strike lists – whereby the parties are provided with a list of arbitrators, and alternately strike names off the list until one remains – has proven to be a workable procedure in many cases in the past. Other approaches could be

available as alternatives, but there should be some specific procedures delineated. One of the primary purposes of rulemaking is to force greater information-sharing with the promulgating agency's clients, and incorporating specific guidelines about arbitrator selection into the proposed rule would serve this purpose.

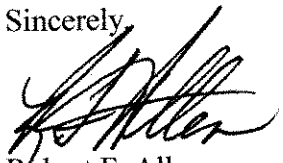
Finally, the fees adopted by the Board in proposed § 1210.12 are too low. If one of the reasons for a fee structure is to reduce the filing of frivolous grievances, the fees must be high enough to provide an adequate deterrent. The experience of the federal courts has shown that even a filing fee as high as $150 will only deter some frivolous claims, and the proposed fee here is only half that amount. Of course, some fee is better than none. But to strike a better balance between (1) access to the arbitral system and (2) cutting off the ongoing torrent of baseless claims, the fee structure should be revised upward by at least $100 per service.

We also note, in this regard, that while the railroads certainly support the concept of filing fees, the source of the Board's authority to impose such fees is not the RLA, but rather a statute such as the Independent Office Appropriation Act ("IOAA"), 31 U.S.C. § 9701, which permits an agency to charge for "a service or thing of value provided by the agency."

Conclusion

The railroads appreciate the NMB's consideration of these comments. While we encourage the NMB to rescind those portions of the proposed rules that contravene the RLA, the railroads stand ready to work with the NMB to achieve our shared goals.

Sincerely,



Robert F. Allen